No. 91-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE COUNTY OF CORTLAND, NEW YORK,

Petitioner,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as Acting United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When Congress rejects a wide array of indisputably lawful techniques for effecting the federal will and, for the first time in this nation's history, issues direct orders to the states -- as has been done in the Low-Level Radioactive Waste Policy Amendments Act of 1985 by requiring the states to provide for disposal of such waste and punishing failure to do so by forcibly transferring the waste to the states -- should those commands be declared violative of fundamental principles of federalism expressed in the Tenth Amendment and the Guaranty Clause of the United States Constitution?

2. Should this Court clarify Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), by recognizing that the political process inadequately protects state sovereignty

when Congress commands the states alone to undertake a specified program of activities without possibility of withdrawal from the field, and thereby avoids responsibility for implementing national policy, blurs the lines of political accountability, and reduces the ability of the states to serve as a check on federal power?

PARTIES TO THE CASE
IN THE SECOND CIRCUIT

1. The State of New York, Plaintiff-Appellant
2. The County of Allegany, New York, Plaintiff-Appellant
3. The County of Cortland, New York, Plaintiff-Appellant
4. The United States of America, Defendant-Appellee
5. James D. Watkins, as Secretary of Energy, Defendant-Appellee
6. Kenneth M. Carr, as Chairman of the Nuclear Regulatory Commission, Defendant-Appellee
7. The United States Nuclear Regulatory Commission, Defendant-Appellee
8. Samuel K. Skinner, as Secretary of Transportation, Defendant-Appellee

9. Richard Thornburgh, as United States Attorney General, Defendant-Appellee[1]
10. State of Washington, Intervenor-Appellee
11. State of Nevada, Intervenor-Appellee
12. State of South Carolina, Intervenor-Appellee

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[1]Richard Thornburgh, former United States Attorney General, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, William P. Barr, Mr. Thornburgh's successor in office, has been substituted as a party in this proceeding.

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The petitioner, the County of Cortland, New York ("Cortland County"), respectfully prays that a writ of

certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in this case is reported at ___ F.2d ____, 60 U.S.L.W. 2147, 1991 U.S. App. LEXIS 18181, and is reprinted in the Appendix at 1a-17a.[2]

The opinion of the United States District Court for the Northern District of New York is reported at 757 F. Supp. 10 and is reprinted in the Appendix at 18a-26a.

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[2] "__a" refers to pages of the Appendix hereto. Pages of the Joint Appendix submitted to the Court of Appeals for the Second Circuit in this case are cited as "Jt. App. at __."

JURISDICTION

The judgment of the Court of Appeals in this case was entered on August 8, 1991. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves fundamental principles of federalism established in the United States Constitution, especially as expressed in the following provisions:

The Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Guaranty Clause: "The United States shall guarantee to every State in this Union a Republican Form of Government,

and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." U.S. Const. art. IV, § 4.

The statute challenged in this case is the Low-Level Radioactive Waste Policy Amendments Act, 42 U.S.C. §§ 2021b-2021j. Pertinent portions of the statute challenged are reprinted in the Appendix at 29a-33a.

STATEMENT OF THE CASE

This declaratory judgment action challenges the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPAA"), 42 U.S.C. §§ 2021b-2021j, as violative of constitutional principles of federalism.[3] LLRWPAA is the federal

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[3]The action was filed originally in the United States District Court for the Northern District of New York pursuant to 28 U.S.C. §§ 1331, 1337,

response to the limited supply of low-level radioactive waste ("LLRW") disposal facilities. The LLRW disposal issue began to receive national attention in the late 1970s, when three of the existing six facilities were closed down because of serious environmental problems.

In an effort to expand disposal capacity, the State Planning Council on Radioactive Waste, the National Conference of State Legislatures, and the National Governors' Association recommended to Congress that the states be given primary control over the disposal site selection process. See Jt. App. at 241. Instead of adopting the recommended policy of primary state control, with continued federal

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1346, 2201, and 2202.

responsibility for disposal of federally generated waste, Congress altogether abdicated its responsibility for the funding and siting of LLRW disposal facilities by transferring that responsibility exclusively to the states.

In the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021j (the "LLRW Policy Act"), enacted on December 22, 1980, Congress affirmatively ordered each state to provide for disposal of the LLRW generated within its borders -- including some of the waste generated by the federal government itself -- within a specific timetable set forth in the statute. Nevertheless, in the years following the enactment of the LLRW Policy Act, there was little progress in developing new LLRW disposal sites.

Consequently, Congress amended the statute in 1985, enacting LLRWPAA,

which set new deadlines and established stiff monetary sanctions for failure to meet them. See 42 U.S.C. § 2021e(d). As an additional penalty, Congress also provided that if a state is unable, by January 1, 1996, to provide for disposal of all commercially generated LLRW (including mixed waste)[4] produced within its borders, the waste generators may notify the state that their waste is available for shipment and then require the state to take title to and possession of their LLRW. The generators may also sue the state for any damages incurred as a result of the state's failure to take possession. See 42 U.S.C. § 2021e(d)(2)(C).

Like the requirement that states alone establish LLRW disposal facilities,

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[4]Mixed waste is waste that is classified as both radioactive and hazardous. See Jt. App. at 47.

LLRWPAA's "take title" provision was adopted without the endorsement of the state organizations that had recommended LLRW disposal policy to Congress in 1980. That provision was introduced at the last minute, by Senate amendment to the House bill, and was accepted by the House on the same day, the last day of the 1985 legislative session. See Jt. App. at 12-13. Officials of the State of New York therefore had no effective opportunity to influence the provision most directly responsible for forcing the states to enter and remain in the field of LLRW disposal.

The intrusion upon state sovereignty effected by LLRWPAA is unprecedented. Each branch of state government -- legislative, executive, and judicial -- has been conscripted into the service of federal goals. State legislative energies have been diverted to the

drafting, debating, and enacting of state laws providing for a new LLRW disposal facility that would never have been contemplated but for the enactment of the LLRWPAA. See, e.g., 1986 N.Y. Laws 673; Jt. App. at 79-80, 87-154. LLRWPAA has also commandeered New York's executive apparatus by compelling the State to develop and administer new regulatory programs for land disposal. See Jt. App. at 80-81. Finally, Congress appropriates New York's judicial machinery by imposing upon state courts the task of enforcing the LLRWPAA's sanctions against the State -- even without prior waiver of the State's sovereign immunity. See id. at 24.

Cortland County, together with the State of New York and the County of Allegany, New York, commenced this action to challenge the constitutionality LLRWPAA's incursion upon state autonomy.

The District Court upheld the statute, see 24a-26a, and the Second Circuit affirmed. See 17a.

The direct orders to the states upheld by the courts below do not "gradually erase the diffusion of power between State and Nation." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting). Those directives, enforced by LLRWPAA's punitive sanctions, abruptly transform the states into instruments of the federal will. Such a radical shift in the balance of power between the federal government and the states should not become final without this Court's prior examination of the constitutionality of the statute.

ARGUMENT

This challenge to LLRWPAA presents a question of first impression for this Court: whether direct federal commands

to the states violate constitutional principles of federalism. The Court of Appeals for the Second Circuit decided that, under Garcia, such affirmative orders to the states were consistent with the system of dual sovereignty established in our Constitution. The Second Circuit's decision countenances an unprecedented extension of federal power and, if not overturned by this Court, will undoubtedly be cited as authority for further incursions upon state sovereignty. Cortland County respectfully suggests that this important question of constitutional law merits the consideration of, and should be settled by, this Court.

The Second Circuit's determination is also inconsistent with the analyses of the Courts of Appeals for the District of Columbia in District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975),

vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown, 431 U.S. 99 (1977) ("EPA v. Brown"); the Fourth Circuit in Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975), vacated and remanded for consideration of mootness, sub nom. EPA v. Brown, supra; and the Ninth Circuit in Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975), vacated and remanded for consideration of mootness sub nom. EPA v. Brown, supra; as well as with this Court's reasoning in South Carolina v. Baker, 485 U.S. 505 (1988) ("S.C. v. Baker"), and Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) ("FERC"). In those cases, the District of Columbia Circuit expressly held, and the Fourth and Ninth Circuits and this Court suggested without deciding, that

affirmative federal orders to unconsenting states are unlawful under the Tenth Amendment. To resolve this conflict in the analyses of the circuits and the inconsistency with prior statements of this Court, and to settle the important questions of constitutional law presented in this case, Cortland County respectfully asks this Court to issue a writ of certiorari to review the judgment and opinion of the Second Circuit.

POINT I

THE QUESTION WHETHER LLRWPAA'S COMMANDS AND PENALTY ARE CONSISTENT WITH CONSTITUTIONAL PRINCIPLES OF FEDERALISM SHOULD BE SETTLED BY THIS COURT

The statute challenged in this case is qualitatively different from any previously considered by the United States Supreme Court. Prior to LLRWPAA, statutes reviewed and upheld by the Supreme Court employed a wide range of

techniques to encourage the states to promote federal goals, but none imposed upon the states an inescapable obligation to enter a new field, and none, to Cortland County's knowledge, attempted to penalize the states by compelling state acquisition of property -- certainly not hazardous private property.

The cases discussed below clarify exactly how far this Court has been willing to go in expanding congressional power under the Commerce Clause. The discussion also demonstrates how much further Congress has gone in enacting LLRWPAA. Before Congress is permitted to effect the extraordinary expansion of power contemplated in LLRWPAA, this Court should carefully review the statute to ensure that it is consistent with constitutional principles of federalism and the guarantee of republican government.

A. LLRWPAA Imposes Inescapable Obligations upon the States

The coercive effect of LLRWPAA is evident on the face of the statute. The statute provides in unequivocal terms: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of" LLRW. 42 U.S.C. § 2021c(a)(1) (reprinted at 29a). No state is exempt from LLRWPAA's requirements; no state may cede the field to federal regulatory authorities; no state may transfer its federally imposed responsibilities to private generators of LLRW.

LLRWPAA also expressly provides:

> By July 1, 1986, each [state that is not a member of a compact region] shall ratify compact legislation, or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste

> disposal facility within the State.

42 U.S.C. § 2021e(e)(1)(A) (reprinted at 31a). Thus, Congress has issued direct orders to the legislature or highest executive officer of each non-compact state, commanding specific action with respect to the establishment of a LLRW disposal facility. The statute also specifies in detail the contents of the siting plan that must be prepared by each of those states. See id. at § 2021e(e)(1)(B)(ii) and (iii) (reprinted at 31a-32a). These are additional non-delegable duties imposed upon the states by the statute.

In addition to the affirmative obligations imposed by LLRWPAA, the statute contains a novel and extreme penalty for a state's failure to provide for such disposal by 1996. The statute compels the state to take title to and

possession of all LLRW offered to it from generators and owners producing such waste in the state or to assume liability for all damages incurred by those generators and owners as a result of the failure to accept that waste. See 42 U.S.C. § 2021e(d)(2)(C) (reprinted in pertinent part at 30a). To our knowledge, LLRWPAA is the first federal statute in the history of this nation seeking to impose such a liability on the states.

B. The Mechanisms of Federal Control Employed in LLRWPAA Contrast Sharply with Those Previously Upheld by This Court

The cases discussed below illustrate some of the lawful techniques that Congress might have used to impose its LLRW disposal policy upon the states. They also illuminate the difference in kind between those constitutional mechanisms of federal control and the

means of coercion adopted in LLRWPAA. The decisions thus present the question whether, in enacting LLRWPAA, Congress has exceeded the limits of its undeniably broad constitutional power and has violated the "residuary sovereignty of the States." Garcia, 469 U.S. at 552 (quoting The Federalist No. 43, at 315 (J. Madison) (B. Wright ed. 1961)). This Court should issue a writ of certiorari to the Second Circuit to settle that important federal question.

1. Preemption and Conditional Preemption

The Supreme Court has consistently held that "when regulations promulgated by [federal and state] sovereigns conflict, federal law necessarily controls." FERC, 456 U.S. at 767. This doctrine, known as the doctrine of preemption, governed the outcome in Hodel v. Virginia Surface Mining &

Reclamation Association, Inc., 452 U.S. 264 (1981). Hodel involved a challenge to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which established federal environmental protection performance standards for coal mining operations. The Act permitted states to establish their own regulatory programs to implement the federal standards and provided for direct federal enforcement of the standards in the absence of such programs. Thus, "the States [were] not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." Hodel, 452 U.S. at 288. Citing a "wealth of precedent" attesting to congressional authority to preempt state laws governing private activity, the Court upheld the Act's program of

"cooperative federalism" against Virginia's Tenth Amendment challenge. Id. at 289-90.

The federal requirements at issue in FERC were more intrusive than those in Hodel. In FERC, provisions of the Public Utilities Regulatory Policies Act ("PURPA") required state regulatory authorities to implement certain federal rules. See 456 U.S. at 759. PURPA also required that state utility commissions "consider," within certain deadlines, the adoption and implementation of specified ratemaking standards. Id.

The Supreme Court applied the doctrine of preemption in upholding the obligation to implement federal rules. A variation of the doctrine was also invoked to uphold the second type of requirement. The Court reasoned that because the federal government could

have preempted all state regulation of utilities, it could adopt the less intrusive course of permitting the states to continue regulating on the condition that they merely consider the federal standards. See id. at 765. Finally, the Court noted that a state could avoid even this obligation if it "simply stops regulating in the field." Id. at 764.

The statutes reviewed in these decisions present a sharp contrast to LLRWPAA. In LLRWPAA, unlike SMCRA, Congress is not volunteering to undertake LLRW disposal if the states decline that opportunity. Nor is Congress merely asking the states to implement federal regulations governing private activity. LLRWPAA governs the states, alone, and as states; Congress abdicates to them the entire responsibility for creating disposal capacity for

commercially generated (and some federally generated) LLRW.

In upholding PURPA, this Court expressly distinguished the obligation to consider federal rules from "a federal command to the States to promulgate and enforce laws and regulations." FERC, 456 U.S. at 762. The very need to make that distinction indicates that this Court regarded such direct commands as constitutionally suspect. Congress ignored this Court's hints when enacting LLRWPAA, however, which directly orders the states to promulgate and enforce new state laws and regulations and does not permit states to "stop regulating in the field."

2. Federal Regulation of Both Private and State Activity

A second category of Tenth Amendment lawsuits challenged statutes that applied federal regulations to

both private activity and the states. Fry v. United States, 421 U.S. 542 (1975) (applying the Economic Stabilization Act to state employees) and Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983) (applying the Age Discrimination in Employment Act to state employees) are examples of this type of suit. So too are Maryland v. Wirtz, 392 U.S. 183 (1968); National League of Cities v. Usery, 426 U.S. 833 (1976); and Garcia, supra, all of which involved claims under the Fair Labor Standards Act.

S.C. v. Baker, supra, also falls into this category. That case involved a challenge to section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), which removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and

local governments unless those bonds were in registered form. TEFRA also imposed tax penalties on unregistered private corporate bonds. The plaintiffs argued that the statute unlawfully commandeered state legislative and administrative processes by effectively coercing states into enacting legislation authorizing bond registration and implementing the registration scheme. This Court rejected those arguments, stating: "That a state wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." S.C. v. Baker, 485 U.S. at 515-16.

The instant case differs crucially from S.C. v. Baker. TEFRA merely requires South Carolina to conform to federal standards while it engages in

voluntary activity, whereas LLRWPAA compels New York to exercise its legislative and executive powers in the field of LLRW disposal, which the State would eschew entirely were it not for the threat of federally imposed sanctions. Unlike TEFRA, LLRWPAA does not regulate ongoing programs; it mandates new activity irrespective of the states' will.

3. Conditional Grants

The granting of federal funds upon the condition that states comply with federal requirements has consistently been held constitutional. See South Dakota v. Dole, 483 U.S. 203, 206-07 (1987) ("S.D. v. Dole"), and cases cited therein. The Supreme Court reaffirmed in S.D. v. Dole that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range

of conditions legitimately placed on federal grants." Id. at 210.

Conditional grants have been upheld because the states are free to decline federal funds. See Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947). When federal benefits are contingent upon a state's cooperation with federal plans, Congress merely prescribes "a condition which the state is free at pleasure to disregard or fulfill." Stewart Mach. Co. v. Davis, 301 U.S. 548, 595 (1937).

The contrast with LLRWPAA is obvious. The State of New York is not free at pleasure to disregard or fulfill the obligation imposed by LLRWPAA. New York is being required to undertake a new and risky business. Its financial resources and administrative machinery are being diverted against its will from the goals preferred by the citizens

of New York to those selected by Congress.

C. The Further Expansion of Federal Power Effected by LLRWPAA Should Not Be Permitted Without Prior Review by This Court

As the discussion above shows, "[t]his Court has been increasingly generous in its interpretation of the commerce power of Congress . . . ." Garcia, 469 U.S. at 583 (O'Connor, J., dissenting). Pursuant to that power, Congress has lawfully preempted state regulation, conditioned federal funding upon the states' compliance with federal rules, and required the states to consider federal standards before regulating ongoing programs.

Congress abjured that entire array of unquestionably lawful techniques for effecting federal policy when it enacted LLRWPAA. In that statute, Congress instead adopted a new and qualitatively

different means of effecting its will. It baldly issued direct orders to the states to undertake new activity.

The courts below treated this novel legislative device as if it were no different from prior exercises of federal legislative power. The Second Circuit wholly failed to appreciate the substantially different implications of the new technique for the accountability of elected representatives and the role of federalism as a check on national power; indeed, that court dismissed arguments directed to those issues without discussion. See 17a. Having declined to consider either the functions or history of constitutional federalism, the Second Circuit concluded that LLRWPAA's direct commands to the states were lawful under Garcia. See 17a.

It is unclear from the majority opinion in Garcia, however, whether

this Court intended the political process to serve as the primary safeguard of state sovereignty when Congress simply orders the states to enter and remain in a new field. Garcia merely concerned an effort to regulate the states along with similarly situated private parties. Likewise, S.C. v. Baker, the only Tenth Amendment case decided by this Court since Garcia, involved a statute that treated private parties and the states equally. Here, where the statute singles out the states for LLRW disposal responsibilities, and in fact lifts and shifts those burdens from the shoulders of private (and some federal) waste generators, it is not obvious whether, and if so how, the approach endorsed in Garcia is to be applied.

The issue presented in the instant case is too important to be finally decided by an intermediate appellate

court. The decision below not only extends the jurisprudential analysis in Garcia far beyond that contemplated by this Court when deciding that case but also, for the first time, allows the federal government to operate directly upon the states rather than through the constitutional mechanism of the Supremacy Clause. See FERC, 456 U.S. at 795 & n.34 (O'Connor, J., concurring in the judgment in part and dissenting in part). Before Congress is licensed to avoid the costs of enforcing unpopular federal programs by simply requiring the states to implement national policy -- as would be permitted pursuant to the decision below -- this Court should consider carefully whether such an extension of federal power is consistent with the history and purposes of constitutional federalism.

Such review is all the more important in view of the longstanding controversy within this Court regarding the proper analytical approach to issues of federalism. Within a ten-year period, this Court twice overruled leading Tenth Amendment cases by narrow 5-4 margins, and both Garcia and National League of Cities contained impassioned dissents. See Garcia, supra (Burger, C.J., and Powell, Rehnquist, and O'Connor, JJ., dissenting), overruling National League of Cities in 1985; National League of Cities, supra (Brennan, White, Marshall, and Stevens, JJ., dissenting), overruling Maryland v. Wirtz in 1976. If the analysis endorsed by the majority in Garcia is to be reaffirmed and applied to LLRWPAA, and thus to future congressional commands to the states, the decision to do so should come from the court best able to

elucidate the intent and scope of Garcia's jurisprudential approach.

In sum, when it enacted LLRWPAA, Congress adopted a constitutionally untried method to enlarge its own power. Because the constitutionality of statutory provisions affirmatively requiring the states to enter a field, without possibility of withdrawal, has never been considered by this Court, the courts below were forced to decide the important issues presented in this case without clear guidance from this Court. To provide clear guidance for future decisions, and to ensure adequate consideration of the consistency of LLRWPAA's commands with the history and purposes of constitutional federalism, Cortland County respectfully petitions this Court for a writ of certiorari.

POINT II

THE SECOND CIRCUIT'S ANALYSIS IS INCONSISTENT WITH THAT OF OTHER COURTS OF APPEAL AND WITH THIS COURT'S STATEMENTS REGARDING THE CONSTITUTIONALITY OF DIRECT FEDERAL COMMANDS TO THE STATES

The Second Circuit is the first appellate court to review the constitutionality of LLRWPAA. Cortland County thus does not pretend that a direct conflict exists among the courts of appeals regarding the legitimacy of that statute.

The Second Circuit is not, however, the first appellate court to decide whether direct congressional commands to the states violate constitutional principles of federalism. The Fourth, Ninth and District of Columbia Circuits, in Maryland v. EPA, Brown v. EPA, and D.C. v. Train, respectively, as well as this Court in FERC and S.C. v. Baker, have addressed that issue and, unlike

the Second Circuit, have consistently found federal orders to the states that prevent them from withdrawing from a mandated activity to be suspect under the Tenth Amendment. The divergent views of the courts of appeals and the inconsistency of the Second Circuit opinion in this case with prior statements of this Court create uncertainty regarding the proper constitutional analysis of congressional orders compelling states to undertake specific activity. This Court should grant a writ of certiorari in this case to settle this important jurisprudential issue.

A. EPA v. Brown and the Decisions of the Fourth, Ninth, and District of Columbia Circuits

The question now facing this Court was first presented to it in EPA v. Brown, supra. That case involved the consolidated review of the decisions of

three circuits, see Maryland v. EPA, supra; Brown v. EPA, supra; D.C. v. Train, supra, concerning the authority of the Environmental Protection Agency ("EPA") under the Clean Air Act to require states to establish mandatory vehicle inspection and maintenance ("I&M") programs. The appellate courts agreed that the Clean Air Act would be unconstitutional if it authorized the I&M requirements.

In Maryland v. EPA, Maryland challenged EPA's right to compel it to enact I&M programs and other pollution control legislation. In evaluating the EPA regulations, the Fourth Circuit distinguished constitutionally permissible forms of federal pressure on the states from attempts by "the nation [to] direct the legislature of a state to act." Maryland v. EPA, 530 F.2d at 225, 228. Finding that the

constitutional validity of the challenged regulations was "very doubtful at the very best," the Court held that the Clean Air Act did not authorize their promulgation. See id. at 225-26.

The Ninth Circuit also concluded that the Clean Air Act would likely be unconstitutional were it to be interpreted to permit imposition of an affirmative state obligation to "undertake a program of control suggested by the Administrator," Brown v. EPA, 521 F.2d at 840, including challenged I&M regulations. That circuit court explained:

> [O]ur constitutional concerns [should not be] interpreted as disfavoring a determination by Congress that the states may regulate certain aspects of commerce which have an effect on interstate commerce only in certain specified ways if a state chooses to regulate that aspect of commerce at all. We are, however, adopting an interpretation which makes it unnecessary for us to face the

> issue of whether Congress can prevent a state's withdrawal from the field.

Id. To avoid problems under both the Tenth Amendment and the Guaranty Clause, the Ninth Circuit determined that the EPA was without statutory authority to compel the states to administer a federally dictated program of environmental control.

In D.C. v. Train, the District of Columbia Circuit agreed that EPA's I&M regulations were invalid in part because they were unauthorized under the Clean Air Act; it also found them unconstitutional. D.C. v. Train, 521 F.2d at 994. That circuit court directly addressed Commerce Clause and the Tenth Amendment challenges to EPA's requirement that the District of Columbia establish federally specified retrofit programs for four types of vehicle. The court distinguished permissible federal

regulation from compelled state administration of the federal regulatory scheme and concluded: "We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist." Id. at 992.

The District of Columbia Circuit also declared the I&M and retrofit regulations unconstitutional under the Tenth Amendment. The court suggested that "the Tenth Amendment may prevent Congress from selecting methods of regulating which are 'drastic' invasions of state sovereignty where less intrusive means are available." Id. at 994. The Court rejected the argument that state administration would be less intrusive than direct federal regulation. "The

principle at work here is not that the states have an interest in keeping the federal government from regulating . . . but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive." Id. (emphasis added).

The Solicitor General petitioned the United States Supreme Court for writs certiorari to review the decisions from the three circuits insofar as they invalidated the I&M programs. In briefing the case, the federal parties admitted that the EPA regulations would be invalid unless modified to remove the requirements that the states enact laws and submit legally adopted I&M regulations. See EPA v. Brown, 431 U.S. at 103. In view of this admission, this Court could simply have affirmed the decisions below. Instead, it avoided

discussing the constitutional questions by declining to review the regulations, vacating the appellate court judgments, and remanding the cases for consideration of mootness. See id. at 104.

LLRWPAA is strikingly similar to the regulations challenged in the EPA cases. Like the EPA regulations, LLRWPAA explicitly directs the states to enact specific new statutes and regulations and imposes serious penalties for noncompliance.[5] Like the regulations, LLRWPAA creates a situation in which the states are forced to enter and are unable to withdraw from a particular

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[5]LLRWPAA goes beyond even these demands, requiring the states to take title and possession of LLRW in perpetuity if disposal facilities are not available by 1996. Because few sites are likely to be ready by then, see Jt. App. at 54-55, Congress has effectively designated new owners of dangerous materials the generation of which is not in the control of the states.

field of environmental concern. The basic constitutional issue skirted in EPA v. Brown is thus virtually identical to that presented in the instant case.

B. FERC

The statute reviewed in FERC, discussed briefly above, offered this Court a second opportunity to decide whether Congress could impose positive duties on the states to undertake specified activity. Justice O'Connor argued that PURPA's directive requiring state agencies to evaluate specified federal standards unconstitutionally "conscript[ed] state agencies into the national bureaucratic army." FERC, 456 U.S. at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part). The FERC majority rejected this view, stating:

> Titles I and III [of PURPA] do not involve the compelled exercise of Mississippi's sovereign powers. And, equally important, they do not set a mandatory agenda to be considered in all events by state legislative or administrative decisionmakers. As we read them, Titles I and III simply establish requirements for continued state activity in an otherwise pre-emptible field. Whatever the constitutional problems associated with more intrusive federal programs, the "mandatory consideration" provisions of Titles I and III must be validated . . . .

FERC, 456 U.S. at 769-70.

The clear implication of this reasoning is that a statute, such as LLRWPAA, that does compel the exercise of sovereign powers and that does set a mandatory agenda to be considered by state legislative or administrative decisionmakers clearly presents constitutional problems. That the FERC majority so understood the limits of the commerce power is clear from its protestation that its holding "[did] not

purport to authorize the imposition of general affirmative obligations on the States." Id. at 769 n.32. Such obligations clearly are not authorized under our Constitution.

C. S.C. v. Baker

In S.C. v. Baker, the State of South Carolina argued that section 310 of TEFRA impermissibly commandeered the state legislative and administrative process. See 485 U.S. at 513. In support of that argument, South Carolina cited FERC, "which left open the possibility that the Tenth Amendment might set some limits on Congress' power to compel states to regulate on behalf of federal interests." Id.

In response to South Carolina's argument, this Court stated:

> The extent to which the Tenth Amendment claim left open in FERC survives Garcia or poses constitutional limitations independent of those discussed

> in Garcia is far from clear. We need not, however, address that issue because we find the claim discussed in FERC inapplicable to § 310.

Id. Again, the implication of this statement is that if the claim discussed in FERC had applied to section 310 of TEFRA, as it unquestionably applies to LLRWPAA's mandates, the Court would have had to address the issue.

This Court's reasoning in finding FERC inapplicable to section 310 suggests that, had the Court reached the issue, it would have found statutory provisions that compel the states to enter and remain in a field unconstitutional under the Tenth Amendment. Section 310 was found not to present any constitutional defect because, like PURPA, its requirements were conditioned upon the state's voluntary undertaking of the federally regulated activity. See S.C. v. Baker, 485 U.S. at 514-15.

Following the logic of the majority opinion, federal statutes that force unconsenting states to undertake new activity violate constitutional principles of federalism.

D. The Decision Below

The clear implication of EPA v. Brown, FERC, and S.C. v. Baker, as well as the EPA cases decided by the Fourth, Ninth, and District of Columbia Circuits, is that Congress lacks the authority to require the states to operate in a field against their will. In reviewing the instant challenge to LLRWPAA, the Second Circuit declined even to mention those cases, which were fully briefed below, except twice to quote S.C. v. Baker. Both quotes were introduced to support the Second Circuit's view that, under Garcia, the Tenth Amendment imposes no limits whatsoever on federal action, provided that the political process

does not operate defectively when Congress exercises its commerce power. See 12a, 16a.

Cortland County argued below that, even under Garcia, the affirmative obligations imposed in LLRWPAA should be found unconstitutional. Cortland County suggested that the avoidance of responsibility, and blurring of the lines of accountability, that necessarily attend congressional commands to the states should be regarded as constitutionally fatal defects in the political process. See FERC, 456 U.S. at 787 & n.19 (O'Connor, J., concurring in the judgment in part and dissenting in part). Cortland County's analysis is consistent with this Court's decision in Garcia as well as the appellate and Supreme Court opinions discussed above.

The Second Circuit summarily dismissed Cortland County's arguments

and disregarded prior analyses whereby federal orders preventing state withdrawal from a mandated activity were found unlawful under the Tenth Amendment. The decision below thus creates doubt about the constitutional status of direct congressional commands requiring the states to enter and remain in a specified field. This issue is far too important to our system of dual sovereignty to remain in a state of uncertainty. This Court should therefore issue a writ of certiorari to the Second Circuit to clarify the jurisprudence of Garcia and its implications for affirmative federal commands to the states.

CONCLUSION

For the reasons stated above, this Court should issue a writ of certiorari to the Court of Appeals for the Second Circuit in this case.

Dated: New York, New York
October 3, 1991

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the United States Court of Appeals, Second Circuit, Dated August 8, 1991

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 1511, 1512, 1513 August Term, 1990

(Argued: May 21, 1991 Decided: Aug. 8, 1991)

Docket No. 91-6031, 91-6033 & 91-6035

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, NEW YORK and THE COUNTY OF CORTLAND, NEW YORK,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and RICHARD THORNBURGH, as United States Attorney General,

Defendants-Appellees,

STATE OF WASHINGTON; STATE OF NEVADA; and STATE OF SOUTH CAROLINA,

Intervenors-Appellees,

AMERICAN COLLEGE OF NUCLEAR PHYSICIANS; ARIZONA PUBLIC SERVICE COMPANY; BALTIMORE GAS & ELEC-

TRIC COMPANY; CALIFORNIA RADIOACTIVE MATERIALS MANAGEMENT FORUM, INC.; COMMONWEALTH EDISON COMPANY; FLORIDA POWER & LIGHT COMPANY; GULF STATES UTILITIES COMPANY; MALLINKRODT MEDICAL, INC.; PACIFIC GAS & ELECTRIC CO.; PUBLIC SERVICE COMPANY OF COLORADO; SOCIETY OF NUCLEAR MEDICINE; SOUTHERN CALIFORNIA EDISON CO.,

Amici Curiae.

Before: MESKILL, PIERCE and MCLAUGHLIN, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*), dismissing a civil complaint seeking declaratory judgment. 28 U.S.C. §§ 2201, 2202.

Held: Under *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, does not violate state sovereignty protected under the Tenth Amendment and related principles of federalism.

AFFIRMED.

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brief submitted for *Amici Curiae*
in support of Appellees.

McLaughlin, *Circuit Judge:*

Plaintiffs-appellants appeal from a judgment entered in the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge),* dismissing a civil complaint seeking declaratory relief. 28 U.S.C. §§ 2201, 2202. The district court found that the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, was not an impermissible affront to state sovereign immunity protected under the Tenth Amendment, and that, absent unequal treatment accorded to the State of New York or a defect in the federal political process, Supreme Court precedent precludes further judicial review of the federal statute. The district court also found no Eleventh Amendment violation and dismissed plaintiffs' remaining challenges as meritless.

For the reasons set forth, we affirm.

BACKGROUND

More than thirty years ago, Congress sought to engage the states in a partnership venture that would recognize the interests of the several states in the peaceful uses of nuclear energy. Pub. L. No. 86-373, § 1, 73 Stat. 688, codified as amended 42 U.S.C. § 2021. *See English v. General Elec. Co.*, 110 S. Ct. 2270, 2276 (1990) ("In 1959, Congress amended the Atomic Energy Act in order to 'clarify the respective responsibilities . . . of the States and the [Federal Government]' . . . and generally to increase the States' role."). Under the Atomic Energy Act, the Atomic Energy Commission, predecessor to the Nuclear Regulatory Commission ("NRC" or "Commission"), was authorized to make agreements with the Governor of any state "providing for discontinuance of the regulatory authority of the Commission" with respect to enumerated nuclear materials and byproducts. 42 U.S.C. § 2021(b).

In 1959, an advisory committee formed at the behest of Governor Nelson A. Rockefeller recommended that New York execute an agreement with the Commission to have the State assume all regulatory control possible under federal law. It should be noted, too, that the advisory committee also recommended at that early date that the State establish a site to store radioactive waste, in part, "to encourage the growth of the atomic industry within the state." Even before the advisory committee's report was issued, the New York State Legislature passed the 1959 Atomic Energy Act, *see* 1959 N.Y. Laws Ch. 41, declaring it to be the State's policy to encourage "development and use of atomic energy for peaceful purposes." New York became a so-called "agreement state" under the federal scheme by 1962. 27 Fed. Reg. 10, 419 (1962).

A concern, universally acknowledged, that has accompanied the expansion of the nuclear industry is the storage

and disposal of low-level radioactive waste ("LLRW") such as contaminated waste from nuclear reactors, hospitals, research laboratories and pharmaceutical companies. During the 1970's, disturbing problems surrounding safe LLRW disposal reached mammoth proportions and commanded immediate congressional attention. As late as 1978 only three states—Washington, Nevada, and South Carolina—had established sites for LLRW operations; the rest of the country transported radioactive waste to these locations—with obvious risks.

The problem worsened dramatically when Washington and Nevada temporarily closed their sites because of improper handling, transportation and packaging of LLRW, shifting an already herculean task onto the lonely shoulders of South Carolina's Barnwell site. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 17, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974, 3006. Understandably vexed that sister states were not bearing a fair share of the disposal burden, Washington voters approved a 1980 initiative to ban in-state disposal of LLRW generated outside Washington State. While that initiative was struck as unconstitutional, *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978)), *cert. denied*, 461 U.S. 913 (1983), it demonstrated that the LLRW problem was fast becoming acute.

Congress turned its attention to these problems but, at the states' request, and in the interest of federalism, deferred action to allow the formulation of state-based and state-created proposals. 1985 U.S. Code Cong. & Admin. News at 3007. The National Governors' Association (NGA) spearheaded the effort with a Task Force to review and formulate a coordinated policy on the LLRW issue. Other state-based associations, including the National Conference of State Legislatures and the President's State Planning Council on Radioactive Waste Management, joined

the effort. *Id.* Because, in the eyes of the NGA, disposition of low-level waste was largely a state responsibility, the Task Force's first recommendation to Congress was that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders, except for waste generated at federal government facilities." Accordingly, the NGA invited Congress to enact legislation that would (1) authorize states to form interstate regional compacts; (2) eventually allow compact regions to exclude LLRW generated outside the region; and (3) provide for the safe interim storage of LLRW.

Congress complied by enacting the Low-Level Radioactive Waste Policy Act of 1980. 42 U.S.C. §§ 2021b-2021d (the "1980 Act"). Subject to congressional consent, states were authorized to form regional compacts and, after January 1, 1986, to refuse waste generated outside these established regions. Many states apparently progressed toward the establishment of regional compacts (or individual "go it alone" in-state disposal sites), but the original target date of January 1986 proved unrealistic. The three states that were accepting LLRW, disquieted with frustration, again looked to Congress. The NGA again stepped in to forge a state-based consensus and negotiated a seven-year extension, or "transition package" with the three sited states, buying more time for the regional solutions to become operable. 1985 U.S. Code Cong. & Admin. News at 3008.

Acting on this consensus, Congress adopted elaborate amendments to the 1980 Act, enacting the Low-Level Radioactive Waste Policy Amendments Act of 1985. 42 U.S.C. § 2021b-2021j ("1985 Amendments"). The 1985 Amendments set out a detailed schedule of deadlines ending on January 1, 1996, set forth periodic milestones for site development, and impose various penalties and surcharges for noncompliance. The penalty that has raised the most hackles is the "take title" provision: states that do not

comply "shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred . . . as a consequence." 42 U.S.C. § 2021e(d) (2) (C).

New York has not joined a regional compact. Choosing instead to "go it alone," New York enacted legislation effective July 26, 1986: (1) promulgating standards for site selection; (2) creating a commission to select a site; and (3) authorizing the construction of a LLRW disposal site. *See* 1986 N.Y. Laws Ch. 673. As of 1989, New York, in full compliance with the 1985 federal amendments, has certified that it will be able to store, manage, or dispose of its LLRW after January 1, 1993. *See* N.Y. Pub. Auth. Law § 1854-c (McKinney Supp. 1991). To date, New York's commission has designated five potential storage sites in New York, three in Allegany County, two in Cortland County.

In February 1990, the State of New York, joined by the Counties of Allegany and Cortland, brought an action in the United States District Court for the Northern District of New York seeking to declare the 1985 Amendments unconstitutional. They claim that the 1985 Amendments violate the Tenth[1] and Eleventh[2] Amendments, as well as the due process clause of the Fifth Amendment[3] and the

---

[1]The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

[2]The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

[3]The due process clause of the Fifth Amendment provides that no person shall:

> be deprived of life, liberty, or property, without due process of law;

U.S. Const. amend. V.

guaranty clause of article IV of the United States Constitution.[4] The States of Washington, Nevada and South Carolina, intervening by right, Fed. R. Civ. P. 24(a), joined the federal defendants to uphold the 1985 Amendments. A legion of utility companies, medical groups, and the like also sought to intervene. Their motions were denied, although they were permitted to file a brief as *amici curiae* in support of the intervenors and the federal defendants.

All parties moved or cross-moved for summary judgment. Fed. R. Civ. P. 56(c). In addition, the intervenors joined in defendants' motion to dismiss the complaint. Fed. R. Civ. P. 12(b)(6). After oral argument, the district court read into the record a decision dismissing the complaint. *New York v. United States*, 757 F. Supp. 10 (N.D.N.Y. 1990).[5] The district court held that the 1985 Amendments

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[4]The guarantee clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

[5]In its written opinion, the district court noted, "[a]t this juncture all parties have moved for summary judgment, and there appear to be no issues of material fact, and the case therefore appears ready for summary treatment by the Court." 757 F. Supp. at 11. The court, however, went on to grant the government's motion to dismiss the complaint. *Id.* at 13; *see* Fed. R. Civ. P. 12(b)(6). It is uncontested that the district court considered documentary evidence and affidavits. Accordingly, we treat the appeal as one from the grant of summary judgment. *Grand Union Co. v. Cord Meyer Dev. Corp.*, 735 F.2d 714, 717 (2d Cir. 1984). In reviewing *de novo* and considering the record in the light most favorable to appellants, we nonetheless fully agree with the court below that there exists no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 902 F.2d 174, 177-78 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991). That said, we review whether the law was correctly applied. *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 203 (2d Cir. 1989); *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 45 (2d Cir. 1988) (citing 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2716, at 654 (2d ed. 1983)).

did not violate the Tenth and Eleventh Amendments, and similarly dismissed plaintiffs' claims under the guaranty clause (and, implicitly, the due process clause), finding such claims "inextricably intertwined with the position just made in this decision, and those claims are accordingly dismissed." *Id.* at 13.

Plaintiffs appeal, reiterating the claim that the 1985 Amendments trench upon state sovereign immunity, but they do not press a due process claim on appeal. *See generally South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (states are not "persons" within the meaning of the due process clause and, thus, are not protected by it); *Alabama v. EPA*, 871 F.2d 1548, 1554 (11th Cir.) (state which has toxic waste disposal site has no Fifth Amendment due process right and, therefore, cannot allege defective notice by the EPA), *cert. denied*, 110 S. Ct. 538 (1989).

DISCUSSION

More than a decade ago, the Supreme Court declared that "[n]uclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978). Thus, appellants undertake an unusually burdensome task to persuade us that federal disposal site control legislation impinges impermissibly upon state sovereignty. Indeed, one circuit court has already said, "that the [Atomic Energy] Act violates the Tenth Amendment has little basis for support. Congress, through its power to regulate interstate commerce and provide for the national defense and general welfare, clearly can enact legislation governing the use of nuclear energy." *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981). We are called upon

to review the 1985 Amendments to that same Atomic Energy Act; the amendments are designed to ensure state compliance with a plan for safe LLRW disposal.

The 1985 Amendments declare that, in addition to certain classes of nuclear waste generated by the federal government,

> Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—
>
> (A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983.

42 U.S.C. § 2021c(a)(1). If a state fails to properly dispose of LLRW, certain penalties ensue:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021e(d)(2)(C).

It is this penalty provision that triggers the most vigorous constitutional challenges.

Appellants' first contention is that the 1985 Amendments violate the Tenth Amendment. Tenth Amendment analysis must now begin with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), where the Supreme Court instructed us that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552 (overturning *National League of Cities v. Usery*, 426 U.S. 833 (1979)). In the intervening years, the Supreme Court has emphasized that the judicial role in evaluating Tenth Amendment challenges is narrowly cabined. *See South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* holds that the limits are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."); *see also* Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 72 (1989) ("In *Garcia*, five justices joined in a majority opinion that, in effect, concluded that if states desire to preserve any aspect of their sovereignty within the federal system they must look to Congress, and not to the courts."); *The Supreme Court, 1987 Term—Leading Cases*, 102 Harv. L. Rev. 143, 228 (1988) (*Baker* "unequivocally repudiat[es] the suggestion that the tenth amendment requires any substantive or qualitative analysis of the national political process").

It is self-evident that virtually every congressional exercise of power under the commerce clause will limit state power over that commerce and, to that extent, will invite state objections under the Tenth Amendment. As the *Garcia* Court observed:

> The fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Garcia, 469 U.S. at 554. (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). Other circuits, including ours, have employed the *Garcia* analysis. *See, e.g., Nevada v. Watkins*, 914 F.2d 1545, 1556 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991); *EEOC v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990) (noting that the "*Garcia-Baker* standard is a very high one"). Quite simply, "[w]ith rare exceptions, . . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia*, 469 U.S. at 550.

Perusing the legislative history of the 1985 Amendments, the conclusion is inescapable that, rather than discovering defects in the political process, both the 1980 Act and its 1985 Amendments are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics. *See* Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437, 474 (1987) [hereinafter *Waste Wars*] ("Th[e] extensive state involvement [in the 1980 federal act and 1985 federal amendments] produced substantial benefits for all the states, strongly suggesting that state sovereignty received adequate protection."). With both statutes, the Congress acted only after robust debate and a clearly articulated acceptance of NGA and other state-based recom-

mendations. New York's senior Senator, urging adoption of the final version of the proposed amendments, proclaimed:

> New Yorkers will continue to light some of their lights with nuclear electricity—and their doctors will continue to use life-saving laboratory tests that depend on the use of radioactive materials. So will the citizens of South Carolina—and they will be able to watch New York, and the rest of the Nation, make their own arrangements to dispose of their own low-level radioactive wastes.

131 Cong. Rec. S38,423 (daily ed. Dec. 19, 1985) (statement of Senator Moynihan).

Turning specifically to the penalty provision that New York finds so offensive, we reject appellants' allegation that the "take title" provision, which they classify as a last-minute amendment to the House bill added to placate Senate demands, is the product of a grievous defect in the political process. They complain that this provision was not subject to timely scrutiny and committee debate. There is an irony in this grumbling when it is recalled that the Senate Environment and Public Works Committee was the author of the take title provision; it numbers among its members Senator Moynihan of New York. *See also Waste Wars*, 11 Harv. Envtl. L. Rev. at 458 ("The House nonetheless accepted the taking title provision by unanimous vote."). In any event, appellants misperceive the issue. "The political process ensures that laws that unduly burden the States will not be promulgated." *Garcia*, 469 U.S. at 556. *See Watkins*, 914 F.2d at 1556-57 ("[T]he tenth amendment does not protect a State from being outvoted in Congress. . . . Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process."); *EEOC v. Vermont*, 904 F.2d at 802 ("In any event, the absence of a given legislator or legisla-

tors, so long as the legislative body's appropriate procedural rules have been followed, does not mean that the national process leading to the enactment of a given piece of legislation was flawed.").

Appellants raise an alternative objection to the take title provision. Noting that *Garcia* cited *Coyle v. Smith*, 221 U.S. 559 (1911), appellants argue that, even after *Garcia*, the Tenth Amendment imposes *some* substantive limitations upon federal power, and they conclude that the take title provision falls within that forbidden zone. We are not persuaded.

In *Coyle*, the Congress sought to condition Oklahoma's admission into the Union upon Oklahoma's agreement to locate, at least initially, its capital in Guthrie and accept certain limitations upon the State's power to change its seat of government. The Supreme Court found such conditions to be a palpable violation of the Tenth Amendment. *See Coyle*, 221 U.S. at 565 (that a state's power to locate its own seat of government "could now be shorn. . . by an act of Congress would not be for a moment entertained").

In testing the waters surrounding *Garcia*'s laconic reference to *Coyle*, the district court perceptively noted that the Supreme Court's central concern in *Coyle* was "equality in dignity and power" among the several states, 221 U.S. at 568, a concern clearly not at issue here where the motivating engine of both the 1980 Act and 1985 Amendments is identical treatment for all states.

It should also be noted that formal transfer of title to nuclear waste, although usually effected by contract, is not uncommon. *See General Elec. Uranium Management Corp. v. United States Dep't of Energy*, 764 F.2d 896, 898 (D.C. Cir. 1985) (Secretary authorized to contract with persons who generate or hold title to nuclear waste, for the transfer of title to the Department of Energy); *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F. Supp. 850, 856 (N.D. Ill. 1990) (contingency clause in contract

between private nuclear generator and private nuclear reprocessing plant requiring the latter, upon noncompliance, to accept title to nuclear waste).

In sum, we are satisfied that the take title provision does not undermine the constitutional structure. Neither does it violate principles of federalism as recently explained in *Garcia*; and "[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Baker*, 485 U.S. at 513 (emphasis in original); *see generally International Assoc. of Firefighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 821 (10th Cir. 1989) (absent agreement between state agency and employees, the Fair Labor Standards Act does not violate the Tenth Amendment by compelling state to compensate employees with overtime pay rather then compensatory time); *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287, 298 (2d Cir.) (Rail Passenger Service Act, requiring the MTA to "permit the operation of Amtrack trains over its lines" does not violate the Tenth Amendment under *Garcia* or conscript the state to act in a way that unconstitutionally promotes a federal policy), *cert. denied*, 479 U.S. 1017 (1986).

Appellants, most notably Allegany County, strive to offer alternative grounds for declaring the 1985 Amendments unconstitutional. We are satisfied, however, that the 1985 Amendments do not violate the Eleventh Amendment. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion reasoning "that Congress' authority to regulate commerce includes the authority directly to abrogate States' immunity from suit"); *see id.* at 57 (White, J., concurring) (agreeing "with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States"); *see also National Foods, Inc. v. Rubin*, No. 91-7084 slip op. 5039, 5043 (2d Cir. June 12, 1991) ("The Eleventh Amendment has been interpreted to render states absolutely immune

from suit in federal court unless they have consented to be sued in that forum or unless Congress has overridden that immunity by statute."); *Russell v. Dunston*, 896 F.2d 664, 667 (2d Cir.) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)), *cert. denied*, 111 S. Ct. 50 (1990). Similarly, we agree with the district court that appellants' argument, anchored in the guarantee clause of article IV, that there is a deprivation of a republican form of government, is analytically indistinct from the arguments supporting sovereign immunity under the Tenth Amendment. *See Baker*, 485 U.S. at 511 n.5 ("We use 'the Tenth Amendment' to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.").

CONCLUSION

We have considered appellants' remaining arguments, but find them without merit. We conclude, therefore, that the 1985 Amendments pass constitutional muster. Accordingly, we affirm.

Opinion of the United States District Court for the Northern District of New York, Dated December 7, 1990

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al,*

Plaintiff,

against

UNITED STATES OF AMERICA,

Defendant.

90-CV-162

APPEARANCES:

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December 7, 1990

CON. G. CHOLAKIS, D.J.*

It is my intention at this time to read a decision into the record. I know that it may seem very unusual that a decision will be read into the record on a matter that is as

*The transcript of this opinion, delivered from the bench, has been edited for grammatical construction, organization of quotations, and augmentation of citations.

complex and involved as this case obviously is. I do not want any of the participants to think that their positions have not been given due weight. We have spent an extraordinary amount of time on this one case in the past two weeks. As a matter of fact, I dare say we have spent as much time on this single case as we have spent on any other three or four cases combined during the last three or four years.

I do think, however, that in fairness to all the participants that a decision be made as quickly as possible so those parties involved can make a determination as to their future course of action. And I do not feel that just letting this matter sit for any length of time will do justice to the parties or to the Act itself. I have listened to all of the arguments presented by all of the attorneys, and I think I have given you relatively free reign because I was waiting to see if anyone could say anything that would change the feeling that the Court had about this subject after reading all of the papers, and as you know, the papers were voluminous. As a matter of fact, if I could sell them by the pound, I think I'd be in very good shape.

The plaintiffs State of New York and the Counties of Allegheny and Cortland challenge the constitutionality of the Low Level Radioactive Waste Policy Act Amendments of 1985, 42 U.S. Code Sections 2021 *et seq*, on the grounds that the Act violates the Tenth and Eleventh Amendments as well as the Guaranty Clause and Due Process Clause of the United States Constitution.

Before the Court are numerous motions and cross-motions. At this juncture all parties have moved for summary judgment, and there appear to be no issues of material fact, and the case therefore appears ready for summary treatment by the Court.

The United States in its motions to dismiss and for summary judgment relies principally on the Supreme Court case of *Garcia v. San Antonio Metropolitan Transit Author-*

ity, 469 U.S. 528 (1985). This case calls into question the judiciary's ability and authority to consider challenges to Congressional power over the States. *Garcia* overturned *National League of Cities v. Usury*, 426 U.S. 833 (1976), in which the Supreme Court proclaimed that the Tenth Amendment limited Congressional power to legislate under the Commerce Clause. The Court concluded in *National League* that the Tenth Amendment sheltered "the states' freedom to structure integral operations in areas of traditional governmental functions". Accordingly, Congress could not displace the states' freedom by regulating "the states as states" and limiting the attributes of state sovereignty. *Id.* at 552-554

In *Garcia*, a sharply divided Court rejected *National League*, concluding:

> In short, the framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of national government itself rather than in the discrete limitations on the objects of federal authority. State sovereign interests, then are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Garcia, 469 U.S. at 552.

The Court in *Garcia* ruled that judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to an inquiry of whether the political process has failed. The Court did, however, indicate that some additional limits might exist on Congressional action based on "the constitutional structure". The *Garcia* court, however, did not define or identify these limits apart from citing without discussion the 1911 Supreme Court case of *Coyle v. Oklahoma*, 211 U.S. 559.

The citing of the *Coyle* case is significant. The *Coyle* case struck down a Congressional enactment which conditioned the statehood of Oklahoma on the placement of the state capital at a certain location. The Court acknowledged at page 565 of that opinion that "the power to locate its own seat of government was essentially and peculiarly [a] state power". The holding in *Coyle*, however, is clearly based on the finding that Oklahoma was being forced to do something which no other state was being forced to do; that being to locate her capital according to the wishes of Congress.

The *Coyle* Court stated in the last paragraph of its opinion on page 58 the following:

> The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears, we may remain a free people, but the Union will not be the Union of the Constitution.

Therefore, this Court reads *Garcia* as allowing judicial interdiction of federal powers over the states in the following areas: One, when that power is the result of a defect in the political process, and two, possibly when constitutional equality among the states has been jeopardized.

Garcia and the 1988 Supreme Court decision *South Carolina v. Baker*, 485 U.S. 505 (1988), foreclose, in this Court's view, judicial review of any Congressional action over the states which is validly enacted and equally applied to all states. Any review of the substantive merits of such an action apart from an inquiry into the "constitutional equality" of the action would require a judicially determined definition of the contours of state sovereignty. This Court is barred by *Garcia* from making such a definition.

The United States argues that there was no defect in the political process in the passage of the Act and that no other judicial challenge may be made pursuant to *Garcia*. Plaintiff Cortland County argues that several political process defects exist which should invalidate the law.

First, Cortland County argues that a lack of political accountability of Congress as regards this Act is a signal that the political process has failed. Cortland's argument is that Congress has passed a law which puts burdens on the states to pass certain unpopular laws. The political "heat" as well as the fiscal burden are then absorbed by the states rather than by Congress, the truly responsible party. Cortland also presents a second political defect theory in which the Congress is portrayed as being controlled by political action committees who have neutralized states' interests and influence.

Taking Cortland's second argument first, it is clear that the pervasiveness of political action committees in Congress is not the type of systemic breakdown envisioned by the *Garcia* court. This argument is really nothing less than an indictment of how the political system works. According to *Garcia*, the proper remedy is not judicial intervention but the rejection by voters of those representatives who are beholden to the special interest groups. The "built-in restraints that our system provides" will presumably correct this perceived problem. Therefore, Cortland's position is, in this Court's view, without merit.

Cortland's argument concerning political accountability is similarly lacking in legal foundation. In the *South Carolina v Baker* case, the Supreme Court declined to define what was meant by "political defects" but did characterize the terms as referred to "extraordinary defects in the national political process". *Baker*, 485 U.S. at 515. The Court in its discussion cited to a footnote contained in the 1938 Supreme Court case of *United States v Carolene Products*, 304 U.S. 144, 152 n. 4.

The Court interprets this authority as meaning that the "political process tests" referred to problems which may have had an untoward effect on a particular law's enactment or its subsequent political review. If the law is validly enacted, it may not thereafter be judicially challenged on political process grounds unless the effect of the law restricts a state from continuing meaningful political participation, where a state is foreclosed from challenging the law politically. In other words, the political process rationale for judicial intervention only arises when the legislative/political avenue has been functionally closed.

Such is not the case here. Nothing in the Act restricts New York's, or any other state's, ability to operate in the political arena and to challenge the law. This is not, in this Court's view, the type of political breakdown or type of extraordinary situation the Supreme Court envisioned as requiring judicial intervention. Therefore, this Court rejects any challenge to the Act based on the so-called "political process defect" test.

New York State argues that *Garcia* left open another path of attack other than the political process test. The State, joined by the other plaintiffs, argues that the Court still has the power to rule that particular laws destroy state sovereignty.

As just explained, this Court does not see how such an argument may be sustained and be consistent with *Garcia*.

Plaintiffs do not allege that New York State is being treated inequitably with other States. The State's argument, reduced to its essence, would require this Court to dictate a sacred province of state autonomy, and this, in this Court's judgment, would violate the *Garcia* holding. In this Court's view, any claims under the Guaranty Clause are inextricably intertwined with the position just made in this decision, and those claims are accordingly dismissed.

The claims under the Eleventh Amendment are likewise dismissed pursuant to the Supreme Court holding in *Pennsylvania v Union Gas*, 491 U.S. 1 (1989).

This Court is aware that the *Garcia* case was decided by a divided court, that the make-up of the Court has since changed, and that the *Garcia* doctrines may not survive. In fact, it may well be this case which results in *Garcia* being overturned. While this Court has problems with the *Garcia* holding, it is nonetheless constrained by the precedents which it reads as residing therein.

The defendant United States' motion to dismiss the complaint is therefore granted in all respects. I believe I have an appropriate order which will be signed and in all probability will be filed today. Thank you ladies and gentlemen.

Judgment of the United States District Court for the Northern District of New York, dated December 26, 1990.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK

vs.

THE UNITED STATES OF AMERICA; WATKINS, JAMES D., as Secretary of Energy; CARR, KENNETH M., as Chairman of the U.S. Nuclear Regulatory Commission; THE U.S. NUCLEAR REGULATORY COMMISSION; SKINNER, SAMUEL K., as Secretary of Transportation; and THORNBURGH, RICHARD, as U.S. Attorney General, *et al.*

Case Number: 90-CV-162.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendants' Motion to Dismiss is Granted and all claims against Defendants are dismissed with prejudice.

Dated: December 26, 1990

GEORGE A. RAY
Clerk

MARY ANN FRANCISCO
(By) Deputy Clerk

EXCERPTS

LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OF 1985

42 U.S.C. §§ 2021b-2021j

Section 2021c(a)(1)(A), (B)

§ 2021c. Responsibilities for disposal of low-level radioactive waste

(a)(1) Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—

(A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983;

(B) low-level radioactive waste described in subparagraph (A) that is generated by the Federal Government except such waste that is—

(i) owned or generated by the Department of Energy;

(ii) owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy; or

(iii) owned or generated as a result of any research, development, testing, or production of any atomic weapon; and

Excerpt
Section 2021e(d)(2)(C)

If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

Section 2021e(e)(1)(A), (B), (C)

(e) Requirements for access to regional disposal facilities

(1) Requirements for non-sited compact regions and non-member States

Each non-sited compact region, or State that is not a member of a compact region that does not have an operating disposal facility, shall comply with the following requirements:

(A) By July 1, 1986, each such non-member State shall ratify compact legislation or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within such State.

(B) By January 1, 1988

(i) each non-sited compact region shall identify the State in which its low-level radioactive waste disposal facility is to be located, or shall have selected the developer for such facility and the site to be developed, and each compact region or the State in which its low-level radioactive waste disposal facility is to be located shall develop a siting plan for such facility providing detailed procedures and a schedule for establishing a facility location and preparing a facility license application and shall delegate authority to implement such plan;

(ii) each non-member State shall develop a siting plan providing detailed procedures and a schedule for establishing a facility location and preparing a facility license application for a low-level radioactive waste disposal facility and shall delegate authority to implement such plan; and

(iii) The siting plan required pursuant to this paragraph shall include a description of the optimum way to attain operation of the low-level radioactive waste disposal facility involved, within the time period specified in sections 2021b to 2021j of this title. Such plan shall include a description of the objectives and a sequence of deadlines for all entities required to take action to implement such plan, including, to the extent practicable, an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning facility operation. Such plan shall also identify, to the extent practicable, the process for (1) screening for broad siting areas; (2) identifying and evaluating specific candidate sites; and (3) characterizing the preferred site(s), completing all necessary environmental assessments, and preparing a license application for submission to the Nuclear Regulatory Commission or an Agreement State.

(C) By January 1, 1990

(i) a complete application (as determined by the Nuclear Regulatory Commission or the appropriate agency of an agreement State) shall be filed for a license to operate a low-level radioactive waste disposal facility within each nonsited compact region or within each nonmember State; or

(ii) the Governor (or, for any State without a Governor, the chief executive officer) of any State that is not a member of a compact region in compliance with clause (i), or has not complied with such clause by its own actions, shall provide a

written certification to the Nuclear Regulatory Commission, that such State will be capable of providing for, and will provide for, the storage, disposal, or management of any low-level radioactive waste generated within such State and requiring disposal after December 31, 1992, and include a description of the actions that will be taken to ensure that such capacity exists.